

(13)
No. 90-1014

Supreme Court, U.S.
FILED
MAY 23 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. LEE, *et al.*,
Petitioners,
v.
DANIEL WEISMAN,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF OF
THE UNITED STATES CATHOLIC CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 24, 1991

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INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practices, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

With well over fifty percent of all Catholic school-age children attending public elementary and secondary schools, the Church maintains a vital interest in the quality of their educational experience. Every student in this country's public and private school deserves a full opportunity to develop intellectually, physically and spiritually. By providing such an education, our schools can serve to prepare children to be responsible and mature citizens. However, when any aspect of their development is ignored or suppressed, the children and society both suffer. Judicial decisions like the one on review here are symptomatic of the trivialization of spiritual and religious values in the public schools in the name of "separation of church and state." In the face of judicial restraint on public expression of prayer on a voluntary basis, it is a serious question whether this Nation can hope to instill in its children the values which the Founders thought necessary to the preservation of civic virtue and public morality.

This *amicus* previously filed briefs in other cases before this Court concerning religion in the public schools and the proper interpretation of the Establishment Clause. See, e.g., Briefs *amicus curiae* of the United States Catholic Conference in *Board of Education v. Mergens*, No. 88-1597; *Bender v. Williamsport Area School District*, No. 84-773; and *Widmar v. Vincent*, No. 80-689. Those briefs indicate the serious attention this *amicus* gives to the proper relation of religious values and education, especially when religious expression is involved. This *amicus* believes that the circumstances of this case demand scrupulous protection, not suppression, of religious expression.

Through their counsel, the parties have given consent to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents a unique challenge to the Court—whether to continue to take a narrow view of the issue of public prayer under the Establishment Clause, or whether to put the issue of school prayer in its proper first amendment context. In the view of this *amicus*, the proper focus for this case requires a comprehensive view of all of the various first amendment liberties implicated by religious speech. In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court found that religious worship and discussion in a public school setting implicated not only Establishment Clause but Free Speech, Assembly and Free Exercise concerns as well. *Widmar* held that the Establishment Clause, when properly construed, could not be used presumptively to suppress other important first amendment interests. The *Widmar* approach, emphasizing freedom of expression, must control in this case.

At each session of this Court, a government employee calls out: "God save the United States and this Honorable Court." In the mind of an atheist, whether the speaker or a listener, the incantation may be empty formalism or, at best, a reminder of an earlier heritage and tradition. In the mind of a believer, the incantation may be a prayer—the deepest expression of a faithful heart. In both cases, the state of mind of the speaker and the listener is beyond the competence of the government to control; it is the quintessence of protected thoughts and beliefs. Similarly, the words expressed, unless within narrow categories of obscene or injurious speech, are entitled to constitutional protection. It follows even more strongly that it is not the government's business to subject the content of a private person's public expressions to a general rule of prior restraint. Yet a content-based restraint on freedom of expression is precisely what the lower courts adopted in this case.

This case is, therefore, one more example of the unjust dichotomy that has developed in lower federal courts'

treatment of cases involving religious speech in our public schools. The courts afford scrupulous constitutional protection to those who speak critically of religion, even within the confines of a public school classroom. Yet they restrain the free expression of anyone who dares speak reverentially to or about God, even at public functions where attendance is voluntary. These contradictory results not only defy common sense, and any definition of justice, they are neither constitutionally required nor permissible. The Establishment Clause alone, when properly construed to effectuate the Framers' intentions, does not require the prior restraint of prayer at government-sponsored functions. The Free Speech Clause, when applied to religious expression as it was in *Widmar*, does not permit it. It is this *amicus*' position that constitutional protection, not just accommodation, is therefore required for the public prayers at issue in this case.

ARGUMENT

I. PRAYER IS A FORM OF EXPRESSION ENTITLED TO FIRST AMENDMENT PROTECTION.

In reviewing this case, this Court may be tempted simply to classify it as "school prayer" and examine only *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Court might also be tempted to view this case as implicating only the Establishment Clause and apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Neither approach embraces the reality that, from *Brown v. Board of Education*, 347 U.S. 483 (1954), through *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), to *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), this Court has more fully and comprehensively delineated the scope of constitutional, especially first amendment, rights in public schools. Of particular importance in this line of cases is *Widmar v. Vincent*, 454 U.S. 263 (1981).

In *Widmar*, this Court took an integrated approach to the various clauses of the first amendment—an approach that recognized the interdependence of Free Speech and Free Exercise, Assembly and Establishment, without diminishing the independent vitality of any of the amendment's various Clauses. *Widmar*, 454 U.S. at 267-77. Unlike *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), which seemingly made Free Exercise dependent on other constitutional guarantees,¹ *Widmar* enhanced the complementary nature of the protection afforded by the first amendment. In particular, the *Widmar* Court recognized religious worship as a form of speech and subjected to strict scrutiny any attempt to use the Establishment Clause to justify a ban on religious speech. *Widmar*, 454 U.S. at 269-70.² For the reasons discussed below, a similar approach is appropriate and necessary to the proper consideration of the issues presented by this case.

A. Public Speakers, Even Those Who Pray, May Not Be Silenced Where School Discipline Is Not Disrupted.

Justice Brennan summarized this Court's view of the important work of public schools in this way:

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. See *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873 (1954). The public school . . . incul-

¹ *Smith*, 110 S. Ct. at 1601-02. For an exposition of the illegitimate bases for creating such dependency, see McConnell, "Free Exercise Revisionism and the *Smith* Decision" 57 *Univ. of Chicago L. Rev.* 1120-27 (1990). Treating this case as if it only embodies one constitutional concern—Establishment—would invite the same kind of narrow jurisprudential error committed in *Smith*.

² Last Term, *Mergens* confirmed the vitality of *Widmar* and exemplified this Court's commitment to comprehensive constitutional analysis. *Mergens*, 110 S. Ct. at 2370-71.

cates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system" *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S. Ct. 1589, 1595, 60 L.Ed.2d 49 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "community values." *Board of Education v. Pico*, 457 U.S. 853, 864, 102 S. Ct. 2799, 2806, 73 L.Ed.2d 435 (1982) (plurality opinion) (citation omitted).

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so.

Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 573-74 (1988) (Brennan, J., dissenting). The petitioners in this case, public school officials, were doing precisely that when they invited a member of the community to give an invocation and a benediction during a commencement exercise. Nevertheless, the United States District Court for the District of Rhode Island,³ together with the United States Court of Appeals for the First Circuit,⁴ intervened. What those courts found to be beyond the school administration's "supremely subjective choices" concerning "fundamental values," "community values," and "moral values" was that the speaker, Rabbi Gutterman, appeared voluntarily, at the invitation of the school's principal, Robert E. Lee, and gave the invocation and benediction during a traditional graduation program at which attendance was voluntary.⁵ Rabbi Gutterman, speaking to and about God, gave thanks for America, for

³ *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990).

⁴ *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

⁵ 728 F. Supp. at 69, *aff'd*, 908 F.2d 1090.

the students, and for life.⁶ His short statements occupied a few moments of a lengthy program and apparently caused no disruption or public protest, not even by plaintiffs in this action.⁷

The plaintiffs here obviously took offense, however, in the very fact that the Rabbi was *praying*.⁸ Some persons in attendance that day may not have believed in God or prayer but thought the Rabbi's remarks superfluous. Others in that audience might have been offended by the fact that a rabbi, and not a priest, imam, or minister, was saying the prayers. Some might have disagreed with the prayers' content—the slightly "political" tone of the invocation,⁹ or the paraphrase of an Old Testament prophet in the benediction.¹⁰ There was something in what was said, how it was said, or who said it, that could, and undoubtedly did, prove upsetting to some of those who chose to attend the ceremony. But it is not the business of the courts to control the subjective intentions, mental impressions, or emotional personalities of the citizenry. One of this Court's most famous, and most quoted, lines from the *Tinker* case is:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to

⁶ *Id.* at 69 n.2, 70 n.3.

⁷ *Id.* at 69-70.

⁸ The *Guidelines for Civic Occasions* pamphlet produced by the National Conference of Christians and Jews, and referred to by the lower courts (908 F.2d at 1095 (Bownes, J., concurring); 728 F. Supp. at 69), states that: "General public prayer on civic occasions is *authentic* prayer that also enables people to recognize the pluralism of the American Society." [Emphasis supplied.] Nothing in this brief *amicus curiae* should be taken to suggest otherwise.

⁹ 728 F. Supp. at 69 n.2, *aff'd*, 908 F.2d 1090.

¹⁰ Compare *id.* at 70 n.3, with Micah 6:8.

avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker, 393 U.S. at 509. Without question, no one intended "discomfort and unpleasantness" to anyone at that graduation ceremony, but if plaintiffs or others were annoyed, their uneasiness could be said to be integrally related to the very nature of freedom of expression. *Tinker*, 393 U.S. at 513.

The mere recitation of the prayers certainly caused none of the disruption to discipline that can justify banning speech in a public school setting.¹¹ By contrast, the lower courts' orders forbidding the invocation and benediction seem to have been much more threatening to the school's peace and order.¹² Even if Rabbi Gutterman, or any other past or future invitee, chose to pray in a manner strictly following the doctrines and traditions of a particular faith, and even if such prayer were delivered in Hebrew, in Arabic, or in Latin, the government would have no business regulating content, style, or manner, so long as discipline, order and civility did not suffer. *Hazelwood*, 108 S. Ct. at 567; *id.* at 573 (Brennan, J., dissenting). Indeed, it could be well argued

¹¹ This Court has stressed that protected speech may not be restrained absent a showing that it will substantially disrupt order:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09 (citation omitted). See also *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

¹² See 908 F.2d at 1090 n.1 (Bownes, J., concurring) (describing what apparently occurred at a subsequent graduation ceremony).

that such prayers by different speakers at various school functions are an appropriate pedagogical approach to instilling in the students a recognition of our country's cultural and religious diversity. See generally *id.* at 578-80 (Brennan, J., dissenting).

The first amendment of the U.S. Constitution enshrines freedom of speech and freedom of religion as "fundamental values necessary to the maintenance of a democratic political system" *Ambach*, 441 U.S. at 77. Without a doubt, one of the purposes of public education is the inculcation of those same fundamental values the amendment protects. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Even though this Court has also said that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions,"¹³ it cannot be that prayer, like obscenity¹⁴ or fighting words,¹⁵ is one of those "modes of expression" "subject to sanctions." *Widmar*, 454 U.S. at 269 n.6; *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

One contemporary commentator has stated that, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers." L. Tribe, *American Constitutional Law* 834 (1978). Likewise, a construction of the first amendment which subordinates the Free Speech Clause to the Establishment Clause ignores the generative history of the amendment. More than that, given their joint placement in the Bill of Rights, it is a logical absurdity and an abuse of basic constitutional principle. The decisions below result in just such an illogical rule of intolerance, namely, that religious expression, however voluntary, orderly, and otherwise appropriate, has no place in a

¹³ *Fraser*, 478 U.S. at 683.

¹⁴ *Miller v. California*, 413 U.S. 15 (1973).

¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

public school. This is an especially dangerous precedent because it withdraws religious values from the educational process at a time when values are formed and conscience is molded.

[T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

American Council on Education, *The Function of the Public School in Dealing With Religion*, 6 (1953). See S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984).

B. This Court Must Not Tolerate Decisional Law That Allows Religious Values To Be Denigrated While Public Reverence Is Prohibited.

When this Court upheld the authority of public school officials to discipline a student for giving a lewd, indecent speech to six hundred fellow students, it stressed that the "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Fraser*, 478 U.S. at 681. According to lower federal courts, however, such "tolerance of divergent . . . religious views" is mandatory, it seems, only so long as those views denigrate religion, God or Jesus Christ.¹⁶ Such tolerance can not be tolerated, however, as soon as someone tries to speak in a reverential way to or about God.¹⁷ The sad fact is that the "habits and manners of civility" this Court spoke of just five years ago in *Fraser* are difficult to discover in the cases that have come to

¹⁶ See, e.g., *Pratt v. Independent School District*, 670 F.2d 771, 776-77 (8th Cir. 1982); *Sheck v. Baileyville School Committee*, 530 F. Supp. 679, 681 n.2 (D. Me. 1982).

¹⁷ *Weisman v. Lee*, 728 F. Supp. at 74-75, *aff'd*, 908 F.2d 1090.

exemplify freedom of expression in the public schools to date.

For example, the decisions below hold that bringing religion even briefly into a public school graduation ceremony is constitutionally forbidden;¹⁸ but in Minnesota, the public school board cannot remove from the classroom a movie that contains graphic violence, denigrates religion, criticizes family values and portrays God as vengeful and bloodthirsty. *Pratt v. Independent School District*, 670 F.2d 771 (8th Cir. 1982). Within the First Circuit, the Constitution forbids the word "God" to be uttered at an official school ceremony,¹⁹ and requires that a public high school teacher be permitted, during a basic English class, to write on the blackboard and discuss openly a profanity for sexual intercourse. *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). In Rhode Island, the federal courts have said that the first amendment does not allow a school principal to invite a member of the clergy to recite a peaceful prayer at a voluntary school function;²⁰ yet one of those same courts has ruled that a male homosexual's freedom of expression would be violated unless he is allowed to invite his male escort to the school's senior prom, even when public disruption is possible. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980). Similarly, although the courts in this case have enjoined the free expression of thanks to God,²¹ in another case the first amendment has been held to prevent administrators from removing a school library book in which the words "Jesus," "Christ" and "God" are used as profanity along with common obscenities. *Sheck v. Baileyville School Committee*, 530 F. Supp. 679 (D. Me. 1982).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 68-70.

²¹ *Id.* at 69 n.2.

Prayers that the district court in this case characterized as voluntary, ecumenical and sensitive to the beliefs and opinions of the community are strictly forbidden;²² yet poems that are vulgar, profane and offensive to community sensibilities must be made available in a public school library. *Right to Read Defense Committee v. School Committee*, 454 F. Supp. 703 (D. Mass. 1978). One federal court will enjoin a school from allowing a clergyman to give a public prayer;²³ while another federal court in the same circuit enjoins a school from suspending a student for publicly giving a teacher "the finger." *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986). A local school principal may not allow a rabbi to ask God's blessing on teachers and God's help for students;²⁴ while another school principal cannot stop a student newspaper from publishing a fictitious letter ridiculing the student chaplain. *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980). A rabbi can be prevented from publicly praising America's court system in an invocation;²⁵ yet the Senior Circuit Judge writing a concurring opinion in this case, acting in his capacity as a federal official sworn to uphold the Constitution, can quote the words of Jesus from the Gospel of Matthew, chapter 6, verses 5-7, to chastise that same rabbi for praying in public. *Weisman v. Lee*, 908 F.2d at 1090-91 n.1 (Bownes, J., concurring).

Reading the above litany of cases, one must ask how the same first amendment can require school administrators to permit teachers in public school classrooms, where students are required to be present, to engage in practices critical of religion;²⁶ while it prohibits admin-

²² *Id.* at 73.

²³ *Id.* at 75.

²⁴ *Id.* at 70 n.3.

²⁵ *Id.* at 69 n.2.

²⁶ *Pratt*, 670 F.2d at 776-77.

istrators outside the classroom, in situations where students and their parents are voluntarily present, from any deference to the religious values of the community.²⁷ What lessons are our children learning about democracy, the Constitution and civic virtue when they can be forced to read and discuss obscenities,²⁸ but they are shielded from even hearing someone pray?²⁹ Without regard to whether any of the Free Speech cases mentioned above were decided rightly or wrongly, the point is that this Court must intervene to resolve the dichotomy that has developed in its first amendment jurisprudence. This Court has already held that prayer, as a form of religious expression, is speech for purposes of first amendment protection. *Widmar*, 454 U.S. at 269. The courts are simply not authorized to discriminate against religious speech or to distinguish between differing modes of religious speech. *Fowler*, 345 U.S. at 70.

If *Tinker* still teaches that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"³⁰ then surely school principals and their invited guests retain their constitutional rights as well. If Principal Lee invited, as a graduation speaker, a person of public notoriety who advocated controversial views on subjects such as the Vietnam war, the Palestine Liberation Organization, homosexuality or defacing the flag, the same courts that banned Rabbi Guterman from future benedictions might well follow their other decisions protecting speech as

²⁷ *Weisman v. Lee*, 728 F. Supp. at 74-75, *aff'd*, 908 F.2d 1090.

²⁸ *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *see also Mailloux*, 323 F. Supp. at 1389.

²⁹ *Weisman v. Lee*, 728 F. Supp. at 74-75 & n.10, *aff'd*, 908 F.2d 1090.

³⁰ *Hazelwood*, 108 S. Ct. at 567 (quoting *Tinker*, 393 U.S. at 506). *See also Mergens*, 110 S. Ct. at 2379 (Marshall, J., concurring in judgment) ("That the Constitution requires toleration of speech over its suppression is no less true in our Nation's schools.").

freedom of expression.³¹ In doing so, those courts could seek solace in this Court's opinion that "[i]n our system, state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. Yet history has shown that under totalitarian regimes, religion is the first to suffer. And as recent world events demonstrate, with freedom and democracy comes the return of the churches. J. Wood, "Rising Expectations for Religious Rights in Eastern Europe" 33 *J. of Church & State* 1 (1991).³²

"We are a religious people," this Court declared in 1952. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).³³ And the fact is, we still are.³⁴ Only forty years after

³¹ *Gay Students Organization of Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 660-62 (1st Cir. 1974); *Cline v. Rockingham County Superior Court*, 502 F.2d 789, 791 (1st Cir. 1974); *Riseman v. School Committee*, 439 F.2d 148, 149 (1st Cir. 1971); see generally *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 902-04 (1st Cir. 1988), cert. denied, 488 U.S. 1043 (1989).

³² See also Luers, "Czechoslovakia: Road to Revolution" *Foreign Affairs* (Spring 1990) 77; Donnelly, "Albania: And Then There Were None" *Time* (May 21, 1990) 37; Hruby, "Keeping the Faith" *National Review* (Jan. 22, 1990) 27.

³³ Twelve years later, Justice Douglas, joined by Justice Black, opined that a challenge to a public school baccalaureate service did not raise a substantial federal question. *Chamberlin v. Dade County, Board of Public Instruction*, 377 U.S. 402, 402-403 (1964) (Douglas, J., concurring in part).

³⁴ Americans are overwhelmingly religious. Gallup & Castelli, *The People's Religion* 4 (1989). Over the past half of the century the "religious character of the nation" has remained "stable." *Id.* Our religious beliefs and practices have changed little, and the importance of those beliefs is undeniable:

It is easy to illustrate the importance of religion to Americans:

—94 percent believe in God.

—90 percent pray.

—88 percent of Americans believe that God loves them, and only 3 percent believe this is not the case.

[Continued]

Zorach, however, the lesson our children are learning from the federal courts is not only the opposite, it is false. Surely in a nation where "fundamental values" are expected to be upheld in our public schools, the religious values of the people must be included. To do otherwise neither "respects the religious nature of our people" nor "accommodates the public service to their spiritual needs." *Zorach*, 343 U.S. at 314.³⁵ In *Fraser*, this Court correctly emphasized that:

[T]hese "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Fraser, 478 U.S. at 681. It is hard to imagine any prayers more "considerat[e] of the sensibilities of others" or more clearly within "the boundaries of socially appropriate behavior" than the invocation and benediction delivered by Rabbi Gutterman at the Nathan Bishop Middle School in Providence, Rhode Island. They deserved constitutional protection, not approbation.

³⁴ [Continued]

—More than three-quarters say their religious involvement has been a positive experience over their lifetimes, with 38 percent saying it has been 'very positive.'

—78 percent say they have given 'a lot' or 'a fair amount' of thought to their relationship with God over the past two years.

Id. at 45 (emphasis added).

³⁵ See also American Council on Education, *supra* at 6.

II. THE ESTABLISHMENT CLAUSE, RIGHTLY INTERPRETED, DOES NOT PROHIBIT WHAT THE FREE SPEECH CLAUSE ALLOWS—PUBLIC EXPRESSION OF RELIGIOUS BELIEF.

The parties presented this case, and the lower courts analyzed and decided this case, as implicating only the Establishment Clause of the first amendment.³⁶ In so doing, they failed to discern that both Free Speech and Religion Clause concerns are implicated.³⁷ *Widmar*, 454 U.S. at 270. It is nevertheless plain from the opinions below that both lower courts in this case considered the State's interest in enforcing the Establishment Clause so compelling that they were willing to engage in the prior restraint of one form of expression³⁸—prayer—at all future graduation ceremonies without regard to where the ceremonies are held, who the other invited speakers are or what they might say, what other types of programs are sponsored by the school system, who initiates the inclusion of prayers in the ceremonies, what other groups are allowed access to the same public facilities and for what purposes, and a host of other factors that are relevant to the scope and appropriateness of the permanent injunction entered below. *Widmar*, 454 U.S.

³⁶ *Weisman v. Lee*, 728 F. Supp. at 70, *aff'd*, 908 F.2d 1090.

³⁷ Because of their approach to this case, the opinions below lack sufficient facts to determine, *inter alia*, what type of public forum is at issue in this case. *Widmar*, 454 U.S. at 267 n.5. Clearly, however, the graduation ceremonies in question are “forums” more “open” than the junior and senior high school classrooms and libraries involved in the cases discussed in part I.B. of this brief *amicus curiae*. *Hazelwood*, 108 S. Ct. at 567-68. Therefore, since the speech protected in those cases has been allowed, the religious speech in this case demands similar treatment. In any case, there is simply no justification for the lower courts’ content-based censorship of religious speech. *Widmar*, 454 U.S. at 276.

³⁸ Such prior restraint is “obnoxious to the Constitution” even when authorized “by judicial decision after trial” as in this case. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

at 267-75; see also *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37, 45-49 (1983).

No matter what their approach to this case, however, both the district court and the First Circuit fell into the fundamental error of misinterpreting the purpose and effect of the Establishment Clause. Properly construed, the Establishment Clause is not “sufficiently ‘compelling’ to justify content-based discrimination against . . . religious speech.” *Widmar*, 454 U.S. at 276. By applying this Court’s Establishment Clause cases in such a way that “[t]hose who are anti-prayer have been deemed the victors,”³⁹ the district court turned the first amendment on its head and transformed the Religion Clauses into the enemy of religion instead of its protector.

A. The Establishment Clause Was Never Intended To Bar Public Expression Of Religious Belief.

The Framers of the Constitution “had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . .; they did not intend to spread over all the public authorities and the whole public action of the nation, the dead and revolting spectacle of an atheistical apathy.” S. Rep. No. 376, 32d Cong., 2d Sess. 4 (1853); see also *Zorach*, 343 U.S. at 312. Any doubt on this point was surely dispelled by the early congressional actions accommodating and even directly benefiting religion in general. *Marsh v. Chambers*, 463 U.S. 783, 786-90 (1983); *Wallace v. Jaffree*, 472 U.S. 38, 99-110 (1985) (Rehnquist, J., dissenting). The Clauses were included in the Bill of Rights “not as a protection from religion, but rather as a protection for religion. They were inserted in our Constitution largely because its framers felt that they were important to insure the continuance and the strengthening of religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.” I A. Stokes,

³⁹ *Weisman v. Lee*, 728 F. Supp. at 75, *aff'd*, 908 F.2d 1090.

Church and State in the United States 556 (1950) (emphasis in original).

In his dissenting opinion in *Jaffree*, Chief Justice Rehnquist quoted extensively from Justice Story, who emphasized that the Framers plainly believed religion and morality to be intimately connected with the well-being of the state and essential to the administration of civil justice.⁴⁰ In addition, Justice Story expressed the view that "universal approbation" would have met any attempt by the government to "level all religions" and hold all in similar indifference.⁴¹ In his Farewell Address, President Washington indicated that "religion and morality are indispensable supports" for political prosperity. Washington's Farewell Address, reprinted in 131 Cong. Rec. S. 1372 (Daily Ed. Feb. 18, 1985). "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience forbids us to expect national morality can prevail in exclusion of religious principles." *Id.* Likewise, Thomas Jefferson often avowed that religious training was a necessary prerequisite for the formation of the democratic citizen. A. Howard, et al., *Church, States, and Politics*, 78-80 (1981). As Rector of the University of Virginia, Jefferson requested and received approval for various religions to establish schools of theology on the public university campus. See *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 245-47 & nn. 11-13 (1948) (Reed, J., dissenting) (quoting extensively from Jefferson's writings on this point).⁴²

The first amendment reflects the experience of its Framers that officially established religion generates re-

⁴⁰ *Jaffree*, 472 U.S. at 104-05 (Rehnquist, J., dissenting).

⁴¹ *Id.*

⁴² Further examples of Thomas Jefferson's support for religion in public life appear in Chopko, "Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations" 39 *DePaul L. Rev.* 1143, 1164-65 (1990).

ligious intolerance and infringes upon personal liberty.⁴³ The Establishment Clause was not designed to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. See *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). When the Establishment Clause is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities, such as voluntary public prayer, which serve the public interest and which pose not the remotest threat to religious freedom. Such suppression of delicate fundamental rights to freedom of speech and religion could well "teach youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

The lower courts' view in this case is, therefore, fundamentally inconsistent with the historical tradition and political reality that resulted in the first amendment. The Framers of the Constitution would be surprised, no doubt, to hear a federal court proclaiming that "God has been ruled out of public education as an instrument of inspiration or consolation."⁴⁴ Indeed, the Framers themselves turned to prayer for just such purposes. For example, on June 28, 1787, at the Constitutional Convention in Philadelphia, Doctor Benjamin Franklin addressed this motion to the President of the Convention, General George Washington:⁴⁵

⁴³ See, e.g., *Schempp*, 374 U.S. at 221-22; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

⁴⁴ *Weisman v. Lee*, 728 F. Supp. at 70, *aff'd*, 908 F.2d 1090.

⁴⁵ *Notes of the Debates in the Federal Convention of 1787 Reported by James Madison* (A. Koch, ed. 1987) 209-10. According to Madison, Benjamin Franklin's stature at the Convention was second only to Washington's. *Id.* at 23.

Mr. President

The small progress we have made after four or five weeks close attendance & continual reasonings with each other—our different sentiments on almost every question, several of the last producing as many noes and ayes, is methinks a melancholy proof of the imperfection of the Human Understanding.

* * * *

In this situation of the Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for divine protection.—Our prayers, Sir, were heard, & they were graciously answered.

* * * *

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service.

One Convention delegate who heard Doctor Franklin's speech that day, later expressed his conviction that God had guided their proceedings. That delegate, James Madison, wrote in *Federalist* No. 37:

It is impossible for the man of pious reflection not to perceive in [the work of the Constitutional Convention] a finger of that Almighty Hand which has been so frequently and singularly extended to our relief in the critical stages of the revolution.

Hamilton, Madison, Jay, *The Federalist Papers* (C. Rossiter, ed., 1961) 230-31. It is also impossible, upon reflection, to believe that those who wrote the Constitution intended for the Establishment Clause to override the Free Speech Clause in general or that, more spe-

cifically, voluntary public prayer at government-sponsored ceremonies was to be prohibited.

B. Even Viewing The Establishment Clause In Isolation, The Expression Of Prayer Is Not Unconstitutional.

The lower courts in this case seem to be of the view that the generative process that led to the Establishment Clause becoming part of the Bill of Rights is of no relevance to determining issues presented by this case. In their view, the Constitution is entirely secular because it does not contain the word God; therefore, their simplistic reasoning goes, there can be no mention of God in a government-sponsored function consistent with constitutional history. *Weisman v. Lee*, 908 F.2d at 1091 (Bownes, J., concurring). Next, they find significance in the fact that the Supreme Court itself has differed on the interpretation of that history. *Id.* at 1092-93. And finally, because there were no public schools at the time of the formation of the Constitution, the courts below seem unable to discern an adequate rule of decision despite the relevance of the history and tradition of the Establishment Clause to the ultimate interpretation of the facts in these circumstances.⁴⁶ The basic conclusion of the courts below is that history and tradition add nothing to the debate and, therefore, need not even be considered. *Id.* Thus the courts here have avoided their responsibility to do what this Court expected of judges—interpret the Establishment Clause such that it “comport[s] with what history reveals was the contemporaneous understanding of its guarantees.” *Lynch*, 465 U.S. at 673.

⁴⁶ Indeed, Judge Bownes, in his concurring opinion construing the words “respecting an Establishment,” cites Justice Stevens’ unique notion that “respecting” includes showing respect for. This turn of a phrase might explain the divergence in the case law noted in argument I.B. above, but it is irreconcilable with the benevolent neutrality that this Court requires of government in its treatment of religious exercise. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

The issue presented in this case is whether an invocation or benediction may be appropriately expressed at a government-sponsored program where children and adults of differing religious dispositions are present. For the plaintiffs to prevail in their proposed application of the Establishment Clause to this issue, this Court would have to find, contrary to its conclusion in *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976), that there must exist a hermetic separation between religion and government. Such has never been the purpose of the Establishment Clause. As detailed by the Chief Justice in *Jaffree*, 472 U.S. at 91-99 (Rehnquist, J., dissenting), the generative process that resulted in the Establishment Clause shows that it had two purposes: first, to prevent Congress from establishing or favoring a *national* religion; second, to prevent Congress from interfering with the *states'* policies with regard to religion.⁴⁷ There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was in any way intended to alter the meaning of an established religion as being a *national* religion.⁴⁸ Likewise there is nothing in the records that indicates a narrow and hostile view of religion.

The first version of the Religion Clause was among a number of amendments to the Constitution proposed by

⁴⁷ 1 *Annals of Congress* 730-31 (Gales & Seaton eds. 1789); Corwin, "The Supreme Court As National School Board" 14 *Law and Contemp. Probs.* 3, 11 (1949); I A. Stokes, *Church and State in the United States* 539-40 (1950); M. Malbin, *Religion and Politics—The Intentions of the Authors of the First Amendment* 16 (1978).

⁴⁸ At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. See III *Debates on the Adoption of the Federal Constitution* 330 (J. Elliot 2d ed. 1836). When the Establishment Clause was made applicable to the states through the 14th Amendment, it did no more than extend the proper definition of *established* to the states as well. *Cantwell*, 310 U.S. at 303.

James Madison on June 8, 1789. *Jaffree*, 472 U.S. at 94 (Rehnquist, J., dissenting). It provided:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution" and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 432-33. The amendments were referred to a Select Committee. *Id.* at 665. Because of the diversity of views on religious liberty among the states, the Select Committee consisted of one representative from each state. *Id.*

The Select Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been deleted.⁴⁹ Deletion of that word reflected a concern that the new government might be viewed as "national" rather than "federal," with authority over state practices beyond its enumerated powers.⁵⁰ On August 15, the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730; *Jaffree*, 472 U.S. at 95-96 (Rehnquist, J., dissenting). He also

⁴⁹ National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

⁵⁰ More than one commentator has noted the importance of the national versus federal issue to the development of the Establishment Clause. See J. Story, *Commentaries on the Constitution of the United States* 731 (1833); Corwin, *supra* note 47, at 10; Malbin, *supra* note 47, at 17.

observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that infringe the rights of conscience or establish a national religion; "to prevent these effects he presumed the amendment was intended" *Jaffree*, 472 U.S. at 95-96 (Rehnquist, J., dissenting) (quoting 1 *Annals* at 730).

If anything, the language of the Select Committee's proposal ("No religion shall be established by law . . .") evoked limited concern that it might be construed *adversely* to religion. 1 *Annals* at 729-30.⁵¹ Madison sought word changes to satisfy those who objected that the proposal might actually be harmful to religion. Ultimately the language passed by the House was indistinguishable from the Select Committee's version explained by Madison. The amendment was intended as a warning sign to government, not a roadblock to the influence of religion. As the Chief Justice has emphasized:

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion.

Jaffree, 472 U.S. at 99 (Rehnquist, J., dissenting).

The importance of the Establishment Clause's generative history was effectively blunted by its omission from consideration in the *Everson* case—the very threshold of Establishment Clause analysis.⁵² *Everson's* sweeping as-

⁵¹ Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." 1 *Annals* at 729. At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. See W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *supra* note 47, at 7.

⁵² *Everson v. Board of Education*, 330 U.S. 1 (1947).

sertions against aid to religion, restated a year later in *McCullum*, 333 U.S. at 210-11, severely restricted the interpretative value of the history of the Religion Clauses. *Everson* suggested that the Religion Clauses were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty enacted in 1785 ("Virginia Bill"). However, the operative language of the Virginia Bill reveals the difficulty with this view:

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief

Everson, 330 U.S. at 13. This Bill differed greatly (a) from that which Virginia recommended two years later as an amendment to the Constitution, (b) from that which Madison proposed, and (c) from that which was finally included in the Establishment Clause. By perpetuating the errors introduced in *Everson*, the lower courts in this case arrived at conclusions that cannot be justified in light of the true history and purpose of the Establishment Clause.⁵³

Because of the weight given to Virginia's church-state tradition by the *Everson* court, and relied upon by the courts below,⁵⁴ it is particularly important to review that State's reaction to the proposed Constitutional amendment. What we now call the Bill of Rights took effect when Virginia finally ratified the first ten amendments to the United States Constitution on December 15, 1791. Two years earlier, when the Virginia legislators had initially considered the amendments proposed by the First

⁵³ *Weisman v. Lee*, 728 F. Supp. at 70 n.6; *Weisman v. Lee*, 908 F.2d at 1093 (Bownes, J., concurring).

⁵⁴ *Id.*

Congress, they postponed ratification and stated their objection to the Religion Clauses:

The . . . amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might notwithstanding, levy taxes to any amount, for the support of religion of its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time, render it as powerful and dangerous as if it was established as the national religion of the country.

This amendment then, when considered as it related to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia and other states, for the protection of these rights.

Journal of the Senate of the Commonwealth of Virginia, 1785-1790, 62-63 (1982). However, no change to the wording of the first amendment occurred between the time of this statement and Virginia's ultimate ratification. Virginia apparently demanded no change, further explanation or even reassurance. Taking the expressed concerns at face value, Virginia voted affirmatively on the Establishment Clause, understanding that its particular view on the relation of religion to government was not adopted.

The fact is that the great variety of people who ratified the first amendment in the states did not share a church-state tradition in common with Virginia or each other.⁵⁵

⁵⁵ The panorama of opinion on church-state relations found expression in the laws of the states. The variety of state statutes were succinctly catalogued by Sanford H. Cobb in S. Cobb, *The Rise of Religious Liberty in America* 507 (1902). I A. Stokes, *supra* note 47, at 444.

Rather, the experience of Virginia differed from that of most early Americans. The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, whose proposal was not adopted, but of the varied and sometimes widely divergent views of all the states on the appropriate relation of government to religion. Virginia cannot reasonably be presumed to have been the desired prototype of people who, with deliberation, selected very different models of church-state accommodation for their own states. The first amendment, ratified by representatives and conventions of eleven states, was the combined product of differing states' preferences. The failure of *Everson* to recognize this reality has led to misguided lower court decisions such as those in this case.

C. Proper Interpretation Of The First Amendment Requires Considering The Clauses Together In Their Historical Context.

Plainly no single *amicus* brief can adequately review Colonial and constitutional history as it has been expounded in books, treatises and articles over the years. Several of those historical works are cited in Chief Justice Rehnquist's dissenting opinion in *Jaffree*, 472 U.S. at 91-103 (Rehnquist, J., dissenting). However, the above brief survey highlights the reality of the issues confounded by the lower courts in this case. In particular, it points to the concerns raised by the Framers during the first amendment's drafting process that the Establishment Clause might be wrongly construed as a limitation on religion, rather than its protector, even though James Madison himself, the principal sponsor of the Clause, clearly disagreed with that construction. Unfortunately, such a prediction seems to have come remarkably close to being true in the hands of the lower courts in this case. One struggles in vain to find in the opinions below some indication that our constitutional traditions received due deference. This Court should, therefore, as it did in

Widmar, pronounce a construction of the Establishment Clause which preserves all the first amendment rights implicated here, while upholding the values sought to be protected by the Framers.

This Court has explained before that it will construe the Constitution reasonably, taking words "in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intention of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall) 351, 369 (1874). The reasonable interpretation of the first amendment, including the Establishment Clause, consistent with the expressed intention of the Framers, does not require the invalidation of the public school practice at issue in this case. Rather, the history and tradition of the Establishment Clause, which this Court scrupulously tries to apply,⁵⁶ indicates that the lower courts were wrong in taking such a narrow and cramped view of the Constitution. A comprehensive and sensitive reading of the first amendment requires a contrary result—a result that protects free expression of religion. *Widmar*, 454 U.S. at 269. This case presents a timely vehicle for this Court to reassert that message.

⁵⁶ *Lynch*, 465 U.S. at 678.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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May 24, 1991